

Kyle, Wonda - ESA

From: Karen Davis [karen_davis@toc.org]
Sent: Monday, May 03, 2004 1:18 PM
To: ofccp-public@dol.gov
Subject: Proposed amendment to 41 CFR Part 60-1

Attached please find TOC Management Services' comments on the proposed amendments to 41 CFR Part 60-1 that appeared in the March 29, 2004 Federal Register. If you have any trouble viewing the attached Word document, please let me know as soon as possible so that we can resend it. Thank you!

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<<Cmts - Proposed Definition of Internet Applicant - to OFCCP.doc>>

05/18/2004

May 3, 2004

Joseph DuBray, Jr.
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OFCCP
Room C-3325
200 Constitution Avenue, NW
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VIA EMAIL: ofccp-public@dol.gov
RE: Proposed amendment to 41 CFR Part 60-1

Comments on Proposed Definition of Internet Applicant

TOC Management Services is an employers' association with over 500 member companies in the Pacific Northwest. Almost all of our members are covered by Title VII; approximately 75 of our member companies are federal contractors who are required to maintain affirmative action plans. Some of our federal contractor members are large companies with multiple locations in many states, while others operate only a single worksite. Because the issues and concerns relating to the Uniform Guidelines on Employee Selection Procedures (UGESP) Q&As published in the March 4, 2004 Federal Register and the Office of Federal Contract Compliance Programs (OFCCP)'s proposed regulation published in the March 29, 2004 Federal Register are intertwined, our comments on both notices are explained below.

Comments on OFCCP regulatory proposal (March 29, 2004)

Definitions (41 CFR 60-1.3)

The proposed definition of internet applicant is reasonably well crafted. It provides a balance between the applicant's desire to understand the qualifications for the job, the employer's need to establish minimum qualifications, and the agency's desire to monitor applicant flow. There are some concerns to be considered, however.

Concern #1: The OFCCP's proposed regulatory definition of internet applicant is different from the definition contained in the jointly proposed UGESP Q&A #96. The most significant difference is that the OFCCP's proposed regulation allows an employer to exclude individuals who do not meet the "advertised, basic qualifications" of the job. Which standard will employers be held to? Is the OFCCP standard a safe harbor in the context of affirmative action audits?

What about an EEOC complaint? Would an employer be held to one standard during an OFCCP audit and a different standard when responding to an EEOC complaint? If so, this would make recordkeeping impossibly difficult and confusing to employers.

Recommendation: Use the OFCCP's definition in the UGESP Q&As. This would provide consistency for employers regardless of which agency is investigating the employer. We believe it is essential for employers to be able to follow a uniform standard in determining who is an internet applicant.

If the joint committee that drafted the UGESP Q&As is absolutely opposed to using the OFCCP's definition, then there are not really any good options but we will mention two options that may be marginally acceptable. One idea that is less attractive than our recommended option of adopting the OFCCP's definition would be to exempt federal contractors from compliance with the UGESP internet Q&As in all employment contexts (i.e., including not only OFCCP audits but also EEOC complaints). The one argument in favor of this idea is that each employer would have a uniform standard to follow (federal contractors would follow the OFCCP definition and noncontractors would follow the UGESP Q&A definition). This approach would still cause confusion, though, particularly for those employers who are federal contractors in one year but not the next. Also, for those employers who have a federal contract at one location and obtain a "separate facility" waiver from OFCCP for their other locations, the use of the OFCCP standard at the contracted facility and the UGESP standard at the non-contracted facilities would be even more confusing and difficult to administer.

There is a second idea that also is not our preferred approach but might at least provide for uniformity of enforcement. This idea would be for the joint committee and the OFCCP to state that even if the language of the UGESP Q&As is different from the language of the OFCCP's regulation, it is the agencies' intent to interpret the two standards consistently. Although most employers would still be confused by the fact that there were two definitions, their advisors on legal, EEO and affirmative action matters would be aware of the agencies' commitment to enforce the standards consistently. These advisors would then be able to assist employers if local EEOC investigators and OFCCP compliance officers attempt to take inconsistent enforcement positions.

Concern #2: Traditionally, unless an employment qualification is extremely clear-cut (e.g., a state bar license for an attorney, a commercial drivers' license for a DOT-covered truck driver, or an electrician's license for an electrician), the OFCCP has required employers to track the race and gender of all individuals who apply for an open, advertised position, even if they lack the employer's desired minimum qualifications. The proposed regulations and the proposed Q&A recognize that this is not practical in the context of internet applicants, due to the sheer volume of electronic applications. However, this leaves the employer in the confusing position of applying a different recordkeeping standard to internet applicants than to applicants who apply on paper or in person.

Recommendation: Why have two different definitions of applicant? Instead, change "Internet Applicant" simply to "Applicant." The only text that would need to change in the proposed definition would be (1)(i), which could be changed to an individual who "submits an expression

of interest in employment.” There would be no need to limit the definition only to individuals who use “the Internet or related electronic data technologies.” The rest of the proposed definition is perfectly workable for all types of applicants, whether in person, on paper or electronic.

The only difference that might make sense in distinguishing recordkeeping for internet applicants could be to retain copies of paper applications (but not track race and gender for AAP purposes) that meet the first, second and fourth elements of the OFCCP’s definition. This would mean that a copy of a paper application would have to be kept in situations where the individual meets all of three tests: submitting an expression of interest in employment, being considered for employment in a particular open position, and not indicating that he or she is no longer interested in employment. However, no race or gender data would be tracked because the individual did not meet the advertised, basic qualifications for the position. This approach would allow the agency to continue its current practice of desiring to view records of individuals who submitted paper applications for open positions, while imposing a consistent method for tracking applicants’ race and gender in the AAP, regardless of the type of application.

Record retention (41 CFR 60-1.12)

The proposal would require employers to retain “any and all employment submissions through the Internet or related electronic technologies, such as on-line resumes or resume databases (regardless of whether an individual qualifies as an Internet Applicant under 41 CFR 60-1.3)....”

Concern #1: Employers would have to retain unsolicited resumes received via email, even if the employer follows a uniform policy of not considering unsolicited resumes. For decades, we have been advising our member companies that if they have a uniform policy against considering unsolicited resumes, then they are under no obligation to retain those resumes. This is a well-established principle that should not be tossed out the window simply because the resume arrives via email instead of U.S. mail. Although there may be a few gems among the pile of unsolicited resumes that employers receive, the vast majority are a waste of time to review. We advise our members that in the long run they are better off to reject all unsolicited resumes and only consider candidates who respond to a specific job posting.

Concern #2: Employers who search a resume database would have to obtain a copy of all the resumes that were in the database at the moment of the search. Each search would require a new “snapshot” to be taken of the resumes in the database, since the contents of such databases typically are in constant flux. This could mean that the employer is obligated to retain electronic copies of hundreds of thousands or even millions of resumes. Even though these records are electronic, the recordkeeping burden of saving such a large volume of data would be enormous.

Recommendation: Require employers to retain records of all applications from individuals who meet the definition of an internet applicant (or even better, the definition of an applicant as suggested above). Also require employers who use a resume database to retain a record identifying the particular database that was used, the specific search terms, and the dates of the searches. This would provide a balance between the OFCCP’s desire to determine if the employer used improper search terms and the employer’s need to have a reasonable recordkeeping standard. As explained above, if the proposed definition is expanded to include all

types of applicants, then it might make sense in this section to require the employer to retain records of paper applications that satisfy the first, second and fourth elements in the definition.

Because we strongly believe that a single definition of internet applicant is needed, we specifically request the OFCCP to also review our comments on the joint committee's proposed definition (see below). The "overview of UGESP Q&A comments" is essentially the same as what was shared above, but the "specific comments on UGESP Q&As" that begin near the top of the next page are different. We have shared these comments with the joint committee also.

Comments on UGESP Q&As clarifying the definition of internet applicant (March 4, 2004)

Overview of UGESP Q&A comments

We appreciate the joint committee's effort to craft a definition of an internet applicant in order to provide employers guidance in their equal employment opportunity, affirmative action and recordkeeping obligations. Our most significant concern, however, is the dual standard that appears to have been created between the UGESP Q&As and the OFCCP's proposed regulation. Which standard will employers be held to? Is the OFCCP standard a safe harbor in the context of affirmative action audits? What about an EEOC complaint? Would an employer be held to one standard during an OFCCP audit and a different standard when responding to an EEOC complaint? If so, this would make recordkeeping impossibly difficult and confusing to employers. We believe it is essential to have a uniform definition of internet applicant.

In comparing the UGESP definition to the OFCCP definition, we believe the OFCCP definition does a better job overall of applying a practical limit on the volume of people who must be considered as applicants. In particular, we are in favor of the OFCCP's exclusion of individuals who do not meet the employer's "advertised, basic qualifications." Our recommendation is to use the OFCCP's definition in the UGESP Q&As. This would provide consistency for employers regardless of which agency is investigating the employer.

If the joint committee that drafted the UGESP Q&As is absolutely opposed to using the OFCCP's definition, then there are not really any good options but we will mention two options that may be marginally acceptable. One idea that is less attractive than our recommended option of adopting the OFCCP's definition would be to exempt federal contractors from compliance with the UGESP internet Q&As in all employment contexts (i.e., including not only OFCCP audits but also EEOC complaints). The one argument in favor of this idea is that each employer would have a uniform standard to follow (federal contractors would follow the OFCCP definition and noncontractors would follow the UGESP Q&A definition). This approach would still cause confusion, though, particularly for those employers who are federal contractors in one year but not the next. Also, for those employers who have a federal contract at one location and obtain a "separate facility" waiver from OFCCP for their other locations, the use of the OFCCP standard at the contracted facility and the UGESP standard at the non-contracted facilities would be even more confusing and difficult to administer.

There is a second idea that also is not our preferred approach but might at least provide for uniformity of enforcement. This idea would be for the joint committee and the OFCCP to state that even if the language of the UGESP Q&As is different from the language of the OFCCP's regulation, it is the agencies' intent to interpret the two standards consistently. Although most employers would still be confused by the fact that there were two definitions, their advisors on legal, EEO and affirmative action matters would be aware of the agencies' commitment to enforce the standards consistently. These advisors would then be able to assist employers if local EEOC investigators and OFCCP compliance officers attempt to take inconsistent enforcement positions.

Specific comments on UGESP Q&As

Regarding the format of the UGESP Q&As, we appreciate the range of specific examples that were provided. The examples help make the applicant definition more understandable to employers. We would like to see this general format continued if the UGESP Q&As are modified before becoming final.

Although we believe it is essential to have a uniform standard for the definition of internet applicant, we have made specific comments on each UGESP Q&A in the hopes that some of the concepts can be retained and applied in a uniform definition.

UGESP Q&A 94: No comments. This is fine.

UGESP Q&A 95: This is a good clarification of the fact that recruiting applicants is different from selecting applicants.

UGESP Q&A 96: As indicated above, we recommend using the OFCCP's proposed definition of internet applicant in order to maintain consistency for employers. Nonetheless, we believe the explanations that are provided and the results that are reached in each of the UGESP Q&A examples make sense and are reasonable. One issue that is not addressed is the situation where an employer advertises a job and is unexpectedly inundated with far more applicants than the employer has the staff to evaluate. In this situation, we would like to propose two alternative solutions. First, an employer could establish a specified "first-come, first-served" numerical limit on the number of applications that would be considered (e.g., the first 100 applicants). Second, the employer could select a sample from the pool, using a uniform, objective and nondiscriminatory standard (e.g., review every fifth application, sorted by arrival time of the application or by first or last name).

UGESP Q&A 97: This example appears to coincide nicely with the OFCCP's proposal to exclude individuals who do not meet the employer's "advertised, basic qualifications" for the position. In the example Q&A, the employer is allowed to exclude individuals with fewer than two years of experience in the industry (essentially the employer has established two years of experience as a basic qualification for the job).

UGESP Q&A 98: This is fine. The principle of applying disparate impact standards to on-line tests the same as for paper tests is reasonable.

Conclusion

I hope this feedback is useful. Again, we believe it is essential for employers to be able to follow a uniform standard for the definition of an internet applicant, and not be subject to two competing definitions. If you have any questions about these comments, I can be reached at 503-620-1710 x326 or by email at karen_davis@toc.org. Thank you for your time and attention.

Very truly yours,

Karen E. Davis
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